on the writ. He found the argument of counsel on behalf of the defendants commendable and adopted it. It is necessary to reproduce it here: —

"They (counsel) therefore argued that unlike the position in England the statement of claim here need only comply with the Rules of the Supreme Court, 1957, but a writ in this country must comply with the substantive provisions of section 7(7) of the Civil Law Act, 1956, and a defective writ here therefore cannot, as in England and because of the slightly different provisions of the said section 4 of the English Fatal Accidents Act, 1846, be cured by a proper statement of claim."

We do not agree with that reasoning. In a dependancy action under section 7(7) of the Civil Law Act the statement of claim shall state the full particulars of the person or persons for whom or on whose behalf the action is brought and of the nature of the claim of which damages are to be recovered. The word "or" should be read as "and". The writ too shall be indorsed with a statement of the nature of the claim (Order 2 rule 1) but not the precise ground of complaint (Order 3 rule 2). If the writ contains technical defects amounting to an irregularity, the subsequent delivery of a proper statement of claim cures the defects provided they do not prejudice the defendant's rights, e.g., depriving him of the benefit of a period of limitation (see *Hill* v. *Luton Corporation, supra; Grounsell* v. *Cuthell*[6]). In *Pontin* v. *Wood*,[7] a much stronger case, the defective indorsement: "The plaintiff's claim is for damages for personal injuries" was cured by the subsequent delivery of a proper statement of claim, albeit after the expiry of the limitation period. The Limitation Acts only required that the writ should be delivered within the prescribed time.

The claim for the remedy under section 7 of the Civil Law Act is given to individual dependants and not to them as a group. What subsection 7 of that section envisages is that not more than one action shall be brought by all the dependants within 3 years of the death of the person deceased. As long as the action is commenced or in other words the writ is issued (Order 2 rule 1) within the prescribed period this court is not concerned with good or bad indorsements. The whole of the defendants' case is disposed of by Devlin J.'s observations in *Hill* v. *Luton Corporation* (*supra*, page 391) that "the (Limitation) Act is not concerned with good or bad indorsements: the only question to be determined under it is whether the action has been commenced within the twelve months".

In the present case the plaintiff issued his writ and served it on the defendants well within time. They knew perfectly well that the plaintiff was claiming damages for negligently causing the death of the deceased at the Penang Adventist Hospital. Yet they seek to bar him on the most technical point — just because he omitted to indorse the words "for the benefit of the dependants, etc." on the writ. We do not think that we should allow this technical objection to prevail. We should apply the well-known words of Holroyd Pearce L.J. in *Pontin* v. *Wood* (*supra*, page 297) when he said that the court would give its aid "to regularising the procedure of a known genuine case commenced before the time limit expired but containing technical defects". That in our opinion will fully satisfy Order 20 rule 4 which reads:

"Whenever a statement of claim is delivered the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ."

We feel the learned judge had failed to direct his mind within the ambit of this general rule.

We therefore allowed the appeal with costs and dismissed the cross-appeal with costs.

Appeal allowed.
Cross-appeal dismissed.

Solicitors: *Harbinder Singh & Co.; Jag-Jit Singh & Co.*

NADEFINCO LTD. v. KEVIN CORPORATION SDN. BHD.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Wan Suleiman F.J.) January 10 and March 20, 1978]

[Kuala Lumpur — Federal Court Civil Appeal No. 90 of 1977]

Practice and Procedure — Limitation — When time begins to run — Contract by mining company for payment of debt by instalments — Guarantee — Failure to pay instalment — Company subsequently wound up — Cause of action accrued when first instalment not paid — Limitation Ordinance, 1953, s. 6(1)(a).

In this case a mining company was in arrears of payment of tribute to the tune of $130,000 due to the respondents. A contract was made whereby the mining company agreed to pay the amount due by instalments, the first instalment to be paid on January 20, 1968. The appellant and two other persons jointly and severally guaranteed the payment. The company did not pay a single instalment and on November 1, 1971 it was wound up. The respondents sued the appellants for the sum of $125,000 which was the limit of the guarantee. The claim was filed on June 19, 1975. The appellants pleaded limitation. The respondents thereupon applied for summary judgment. The application was disallowed by the Senior Assistant Registrar but on appeal to the High Court leave was given to the respondent to sign final judgment. The appellant appealed.

Held, allowing the appeal: the cause of action in this case accrued the instant the mining company failed to pay the first instalment due and therefore the action was barred by limitation, the action being commenced more than six years after the cause of action arose.

Cases referred to:-

(1) *Wilkinson* v. *Verity* (1871) L.R. 6 C.P. 206, 209.

(2) *Reeves* v. *Butcher* [1891] 2 Q.B. 509.

(3) *McHenry McDermott* v. *Boyd* [1894] 3 Ch. 290.

(4) *Lakshmijit* v. *Faiz Mohamed Khan Sherani* [1974] A.C. 606.

(5) *Hemp* v. *Garland* 4 Q.B. 519.

FEDERAL COURT.

B.K. Ong for the appellants.

C. Abraham for the respondents.

Wan Suleiman F.J.: There are two judgments in this case, written by the L.P. and the C.J. Borneo, and I agree with both of them.

In their absence, I shall read first the L.P.'s judgment. (Reads).

Suffian L.P.: (read by Wan Suleiman F.J.): The plaintiffs granted a mining company a sub-sublease under which the company was to pay the plaintiffs tribute. The company was in arrear to the tune of $130,000.

By a contract in writing dated December 20, 1967, between (1) the plaintiffs, (2) the mining company and (3) the defendants and two others, the defendants and the two others acknowledged that the $130,000 was due from the company to the plaintiffs; the first three asked the plaintiffs to forbear enforcement of the payment of that money and to allow the company to pay it by monthly instalments, the first instalment to be paid on January 20, 1968; and the three jointly and severally guaranteed the repayment of the money to the plaintiffs.

The contract finally provided that in the event of any default in the payment of the said instalments or in the event of the winding up of the company the whole sum or the balance outstanding shall become immediately due and payable by the company and the other two.

The company did not pay a single instalment (the first instalment being due on January 20, 1968).

On November 1, 1971, the company was wound up.

The guarantee being limited to $125,000, the plaintiffs sued the defendants for that amount.

The plaintiffs filed their claim on June 19, 1975.

The defendants deny liability and in the alternative plead that the action, having been brought after the expiration of six years from the date on which the cause of action accrued, is barred by section 6(1)(a) of the Limitation Ordinance No. 4 of 1953, which reads:

"Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say —

(a) actions founded on a contract or on tort; . . . ."

The plaintiffs applied under O.14 to sign final judgment, but the learned Senior Assistant Registrar disallowed their application and allowed the defendants unconditional leave to defend.

On appeal the learned judge gave leave to the plaintiffs to sign final judgment.

The defendants have appealed to us.

The only issue before the learned judge and before us is limitation: when did time begin to run against the plaintiffs? The plaintiffs say and the learned judge agreed that it began to run from the date of the winding up of the company and therefore this action is not barred by the Ordinance. The learned judge said that the amount claimed fell due on alternative dates, either in the event of any default in the payment of the instalments or in the event of the winding up of the company and that where plaintiffs have an alternative, as here, they can choose the later event as the date on which their cause of action accrued, and that is why their action is not time-barred.

The defendants on the other hand contend that here there is only one cause of action — founded on contract — not two; that the moment the defendants failed to pay the first instalment due the whole sum became immediately due and payable and that was the instant from when time began to run; and that to treat the date of the winding up of the company as the instant from when time began to run amounts to according the plaintiffs two causes of action. Otherwise, it is said, if the company is wound up 20 or so years after the date of first default, the plaintiffs can then still pursue the matter, despite the fact that during the previous two decades they had been sleeping and done nothing.

In my judgment, the cause of action accrued the instant the defendants failed to pay the first instalment and this appeal should therefore be allowed.

The general rule was stated by Willes J. in the Court of Common Pleas in *Wilkinson* v. *Verity*[1] as follows:

"It is a general rule that, where there has once been a complete cause of action arising out of contract or tort, the statute [of limitation] begins to run, and that subsequent circumstances which would but for the prior wrongful act or default have constituted a cause of action are disregarded. As, for instance, in the case of a bill of exchange drawn at so many months after sight, and refused acceptance, the cause of action is complete and the statute begins to run upon the refusal of acceptance, and no new cause of action arises upon refusal of payment."

Mr. Ong for the defendants before us relies on the above passage.

Mr. Abraham for the plaintiffs on the other hand wishes us to apply the exception to the general rule stated in the paragraph immediately following the above passage. I need only reproduce its relevant part which is as follows:

"The rule that a cause of action arises once for all upon the first default is, however, not universal; for, in cases where a man undertakes to do an act upon a future day, and before the day arrives disables himself from performing the act, or positively and absolutely refuses to be bound by or perform his contract . . . it is in the option of [the opposite party] at his election to treat that conduct as of itself a violation and breach of the contract, or to insist upon holding the repudiating party liable, and sue him for non-performance when the day arrives. The misconduct of the party who acts in fraud of the bargain in such cases gives the other party thereto the election of suing either for the first violation or for non-performance at the day; and it does not furnish the wrongdoer with any answer to the latter."

With respect I am of the opinion that the general rule above stated applies here, and not the exception.

A case twenty years later, *Reeves* v. *Butcher*[2] supports me. There by an agreement in writing, under which the plaintiff lent a sum of money to the defendant, the defendant agreed to pay interest quarterly, and the plaintiff agreed not to call in the money for five years if the defendant should regularly pay the interest. It was further provided that if the defendant should make default in the payment of any quarterly payment of interest for 21 days, the plaintiff might immediately call in the principal. Nothing was ever paid by the defendant on account of interest or principal. Within six years from the end of the term of five years the plaintiff commenced action to recover the principal and also the interest due thereon for the period within six years before the date of the issue of the writ. The Court of Appeal held that the cause of action arose at the expiration of 21 days from the date when the first instalment of interest became due, which was the earliest time at which the plaintiff could have brought the action, and, therefore, the plaintiff's claim was barred by the Statute of Limitations.

Lindley L.J. succinctly stated at page 511 the principle applicable as follows:

"The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought."

Three years later a similar problem arose in the Court of Appeal in *In re McHenry McDermott* v. *Boyd.*[3] There a man borrowed money. First, he undertook to pay the lender in February 1883. Secondly, he deposited securities which the lender was authorized to sell if the loan was not paid, and undertook to pay the difference if the proceeds of the sale were not enough to pay the debt. The borrower paid one amount in February 1884, and nothing thereafter. In 1889 the lender sold the securities. The proceeds were not enough to pay the debt. So he sued to recover the difference. The court held that he was barred by the Statute of Limitation. It was argued on behalf of the lender that time began to run against the lender only from 1889, when the securities were sold and the actual amount payable by the borrower was ascertained; that the contract between the two was severable; that it was its second part that gave rise to the claim, namely for the difference between the proceeds of sale and the original advance; and that that difference, and consequently the cause of action, was not ascertainable until 1889. Lord Herschell L.C. rejected this argument, saying at page 293:

"I cannot say that that right of realization gave a new, separate, and independent cause of action, so that the statute did not begin to run until from that date. The truth is that the debt is one debt only."

Lindley L.J. was also a member of the court then, and he said at page 295:

"The realization of the security does not add to the cause of action; the cause of action accrued long before."

Similarly, in my judgment, here too there is only one cause of action and it accrued as soon as the defendants failed to pay the first instalment due.

I do not think that the Privy Council case of *Lakshmijit* v. *Faiz Mohamed Khan Sherani*[4] cited by Mr. Abraham helps in the determination of this appeal.

As the appellant succeeds, the next question that arises is: what is the proper order that should be made? I think that we should set aside the order made by the learned judge and substitute therefor an order disallowing the plaintiffs' application to sign final judgment and allowing the defendants unconditional leave to defend.

Wan Suleiman F.J.: I shall now read the C.J. Borneo's judgment. (Reads).

Lee Hun Hoe C.J. (Borneo) (read by Wan Suleiman F.J.): I have the advantage of reading the judgment of the Lord President with which I agree. I wish merely to add a few words. I need not refer to the facts as they have been set out by the Lord President in his judgment.

This appeal is against the decision of the learned judge in setting aside the order of the Senior Assistant Registrar disallowing plaintiffs to sign final judgment under Order 14 and allowing defendants unconditional leave to defend. The power to dismiss an action summarily without permitting a party to proceed to trial is a very drastic power and should be exercised with utmost caution. Had the matter depended merely upon the question of election I would be loath to differ from the opinion of the learned judge.

The only issue is limitation. The question is whether time runs from the date of default of payment, that is, January 20, 1968 when the action would be time-barred or from the date of winding up, that is, November 1, 1971 when it would not be time-barred. The contention of the plaintiffs is that where the right to sue arises either in the event of default or event of winding up, they are entitled to an election. They had elected the date of winding up as the date on which the right of action accrued. The learned judge was of the view that plaintiffs were entitled to so elect.

Section 6(1)(a) of the Limitation Ordinance, 1953 states that: —

"Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say —

(a) actions founded on a contract or on tort;".

It is the contention of defendants that there is only one cause of action founded on contract and that time runs from the moment of the default of the first instalment. In support they cited *Reeves* v. *Butcher*[1] where Lindley L.J. observed that: —

"This expression "cause of action', has been repeatedly the subject of decision and it has been held, particularly in *Hemp* v. *Garland,*[5] decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events, but it has always been held that the statute runs from the earliest time at which an action could be brought."

Halsbury's Laws of England, 3rd Edition, Volume 24, page 195, para. 347 reads: —

"Where there has once been a complete cause of action arising out of contract or tort, time begins to run, and subsequent circumstances which would, but for the prior wrongful act of default, have constituted a cause of action are disregarded."

In the present case the right to bring an action may arise either on default of payment or winding up. But, the cause of action would arise on whichever of the two events occurred first. As default of payment happened first, time began to run from that moment. The winding up occurring subsequently would have to be disregarded since time had begun to run earlier. There is only one cause of action and the case of *Lakshmijit s/o Bhai Suchit* v. *Faiz Mohamed Khan Sherani*[2] does not assist defendants. There the question was whether the vendor's action was barred by limitation. In dismissing the appeal, the Privy Council (Viscount Dilhorne dissenting) held that under the agreements the purchasers were only under an obligation to pay the whole purchase price on default on payment of the instalments if the vendor elected to demand such payment, and likewise the right to possession only accrued to the vendor if he elected to rescind the contract; and that, therefore, the purchaser's possession of the land was not adverse to the vendor until he exercised the right to rescind and accordingly the action was not statute-barred. That case was concerned with the contract for the sale of

land under which the vendor was expressly given the right to rescind the contract. The right to possession did not arise until the vendor had elected to rescind. As Lord Cross of Chelsea said at page 616: —

"An election by the vendor to exercise a remedy of rescission alters the rights and obligations of both parties to the sale agreement, since it puts an end to the purchaser's right to possession of the land and prevents any further instalment of the purchase price becoming due."

Also, it was a case where the vendor could elect between inconsistent remedies. This is not so in the present case so that the question of election does not arise. There was only one cause of action which accrued upon the event of default of payment and not upon the event of winding up.

Appeal allowed.

Solicitors: *Mah-Kok & Din; Shearn Delamore & Co.*

TROPICAL TIMBER INDUSTRIES LTD. & ORS. v. SHERIFF OF HIGH COURT, PENANG

[F.C. (Ong Hock Sim, Raja Azlan Shah and Chang Min Tat F.JJ.) December 8, 1977 and April 7, 1978]

[Penang — Federal Court Civil Appeal No. 91 of 1976]

Practice and Procedure — Admiralty suit — Order for sale of ship — Expenses incurred in removing goods from ship before sale — Shipchandlers claiming disbursement and expenses — Order that Sheriff include amount in his expenses — Sheriff applying by summons in chambers for amount to be paid out of proceeds of sale — Wrong procedure — No miscarriage of justice — Reliance on English procedure unjustified — R.S.C. 1957, O.52 r.1.

In this case in an admiralty suit an order had been made for the sale of a ship. Before the ship could be sold, its cargo had to be discharged and for this purpose a firm was engaged. This firm claimed its disbursements and expenses in an originating summons and it was ordered that the Sheriff should add and include the amount in his expenses. The Sheriff subsequently applied by summons in chambers in the admiralty suit for the amount to be paid out of the proceeds of sale. The matter was adjourned to open court and the application treated as a notice of motion and an order in terms was made by the High Court. The appellants appealed.

Held: (1) the procedure adopted in this case was wrong as application should have been made by the Sheriff by notice of motion but the order in the Originating Summons was not a nullity despite the failure to comply with the rules, as the failure did not result in any miscarriage of justice or in any adverse effect on the other parties;

(2) in regard to the summons in chambers too no failure of justice was caused as the parties were heard in open court as on a motion;

(3) in this case there was provision in the Rules of the Supreme Court and therefore reliance on the English rules was unjustified.

FEDERAL COURT.

C. Arul (*N.T. Veloo* with him) for the appellants.

Lim Beng Choon (Senior Federal Counsel) for the respondent.

N. Chandran for the caveator.

V. Thevendran for the other caveators.

Chan Beng Eng for the original plaintiffs.

Chang Min Tat F.J. (delivering the judgment of the Court): This appeal is from the order of the learned judge in Penang made on a summons-in-chambers in an Admiralty suit. The application was made by the Sheriff of the High Court in Penang and the summons was served on the solicitors for the plaintiff as well as the solicitors for the intervenors and the caveators. It was for an order that the sum of $139,441.19 which had been added to and included in the Sheriff's expenses and charges by Order of Court dated May 24, 1976 in Originating Summons No. 342 of 1975 be paid to the applicant out of the proceeds of sale of the vessel in question.

This sum of $139,441.19 was the disbursements and expenses incurred in the course of discharging the cargoes from the ship to the godowns of the Penang Port Commission and included bunkering and water-supply to the ship. The cargoes had to be first discharged before the ship could be sold.

The application was heard in Chambers on June 3, 14 and 21, 1976 but on objection being taken to the form of the application, was adjourned into open court by the judge and ordered to be treated as a notice of motion. At the conclusion of the hearing in open court, an order was made in terms of the prayer sought. From that decision, the intervenors appeal to this court, but not the caveators.

An order had been made earlier, on December 5, 1975, for the payment of the Sheriff's expenses. It was obvious that further expenses would be incurred by the Sheriff from time to time. This sum of $139,441.19 was such a sum. Syarikat Asian Enterprises to whom the task of discharging the cargoes was given, claimed to have spent this sum by way of disbursements and expenses but in Originating Summons No. 342 of 1975, and not in the Admiralty Suit, applied for reimbursement. At the hearing, counsel for the applicant and the Sheriff appeared. An order was made on May 24, 1976 that the Sheriff add and include in his expenses this sum. A further order was made that the Sheriff reimburse the applicant with this sum from the proceeds of sale of the ship. On May 28, 1976, the Sheriff filed his memorandum of the order and his determination of priority of the claim over all other claims. Later, on June 22, 1976, he incorporated this memorandum in the form of an affidavit, to comply with the rules.

From that order, no appeal has, quite understandably, been lodged. But no application was ever made by anyone who had notice of it and had been served with it, and who considered it wrong, to have it set aside for good reasons.

It was and is now again said, by the intervenors, who are the appellants before us, that the Order of Court in the Originating Summons was bad in law and a nullity. That was because the procedure by Originating Summons was wrong. The application should have been by notice of motion in the Admiralty suit. But because it was made by Originating Summons, the order was a nullity. The stand taken by the intervenors is that because it was a nullity, there was no necessity to appeal therefrom.

The intervenors also contend that the subject-matter of the appeal, the summons-in-chambers, was